Supreme Court of the United States

October Term, 1967

No. 823

UNIFORMED SANITATION MEN ASSOCIATION, INC., ET AL.,

Petitioners,

against

COMMISSIONER OF SANITATION OF THE CITY OF NEW YORK, ET AL.,

Respondents.

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I.

Section 1123 is unambiguous, and provides for the automatic termination of public employment upon invocation of the privilege against self-incrimination.

A. Respondents' brief studiously avoids any reference to the language of the Charter provision whose constitutionality is the subject of this case. Instead, it is argued that the Charter may be, and has been, rewritten by administrative practice and judicial interpretation so as to provide for "a hearing . . . prior to dismissal" (Resp. Br. 11) and that as rewritten it is constitutional under the Court's decisions subsequent to *Slochower* v. *Board of Education*, 350 U.S. 551.

Respondents are in error upon both points. Section 1123 of the Charter provides for the automatic termination of employment upon assertion of the constitutional privilege in exactly the same manner as when the New

York Court of Appeals so interpreted the identically worded predecessor section in *Daniman* v. *Board of Education*, 306 N.Y. 532 (1954), *appeal dismissed*, 348 U.S. 933.[1] One would have thought that this decision, the only interpretation of the Charter provision in question by New York's highest state court would have been discussed by respondents. Instead, they incorrectly urge (Resp. Br. 12-13) that subsequent state court decisions have, in effect, reversed the New York Court of Appeals' interpretation of the Charter provision.

It would be strange if lower court decisions could effectively change the language of the Charter contrary to the interpretation given by the highest state court. Contrary to respondents' assertions, however, such a "re-interpretation" has not occurred here. In *Gardner* v. *Murphy*, 46 Misc. 2d 728 (Sup. Ct., N.Y. Co. 1965), a state Supreme Court Justice at Special Term sought to rewrite the Charter provision in light of *Slochower* by requiring the Police Department to give the employees a hearing before dismissal. Upon the Police Commissioner's appeal to the Appellate Division with respect to one of the policemen who was the subject of the *Gardner* decision, the Corporation Counsel of the City of New York successfully urged a construction of the Charter contrary to that which he now presents. He said:

> "A hearing, presumably before the Police Commissioner, following petitioner's appearance before the Grand Jury, would have been a useless formality. There can be no dispute as to the essential facts that make the Charter section operative: petitioner's appearance before the Grand Jury, a request by the District Attorney that he sign a waiver of immunity with respect to the performance of his official duties and his refusal to sign such a waiver. No discretion

[1] As indicated in petitioners' brief at p. 9, § 903 of the Charter, held unconstitutional in *Slochower*, is identical in language with § 1123 involved in this case.

> is vested in any commissioner or department head to disregard the mandatory provisions of the Charter section.
>
> • • •
>
> Nothing could be brought out at a hearing, even if one were required to be held, that could in any way alter the essential facts that brought Charter § 1123 into operation. The Police Commissioner properly and lawfully terminated petitioner's employment as a police officer of the City of New York." (Brief of Corporation Counsel for the appellants in *Matter of Koutnik* v. *Murphy*, 25 App. Div. 2d 197, pp. 11-12.)

The Appellate Division agreed with the Corporation Counsel's interpretation and reversed the lower court stating:

> "Section 1123 of the City Charter provides that if any officer or employee of the city shall after process willfully refuse to waive immunity on account of any matter having to do with, *inter alia*, the official conduct of any officer or employee of the city, 'his term or tenure of office or employment shall terminate and such office or employment shall be vacant'. *It will be observed that it is the event itself which terminates the employment rather than any adjudication or finding of the same.* As far as it is possible to do so, the statute provides for a procedure which is self-executing (see *Matter of Daniman* v. *Board of Educ. of City of N.Y.*, 306 N.Y. 532, 538). *It is the event which terminates the tenure*; any notice by the authority (in this case the Police Commissioner) merely fixes an effective date for the concomitants of the termination of tenure, such as salary payments, performance of duties or the like. Where the operative facts appear, the Commissioner enjoys no choice of discretion. He must recognize that the offender's connection with the department has ceased, and take whatever administrative steps are needed to give practical effect. So that it clearly appears that the statute authorized, if it did not mandate, the procedure adopted

by the Commissioner." *Matter of Koutnick* v. *Murphy*, 25 A.D. 2d 197, 200-201 (1st Dept. 1966) (emphasis added).

Respondents have not cited this case. Instead, they cite another Appellate Division decision, *Conlon* v. *Murphy*, 24 App. Div. 2d 737 (1st Dept. 1965), where the court required a hearing, not to assess the employee's refusal to testify under Section 1123, but to meet his claim that he was denied the right to consult counsel in connection with his appearance before a grand jury. This is very different from the issue here, which is whether Section 1123 provides for a hearing to assess the propriety of the assertion of the privilege or of the refusal to waive immunity.

The respondents also cite *Gardner* v. *Broderick*, 20 N.Y. 2d 227 (1967)[2] (Resp. Br. 13) to support their position that the New York courts require a hearing in proceedings under § 1123. In *Gardner*, however, the Court of Appeals did not change the interpretation of the Charter provision which it had made in *Daniman;* its opinion is silent with respect to that decision and to the decision of this Court in *Slochower*. It said nothing about a hearing procedure being written into § 1123. Instead, the court said that "section 1123 of the Charter required him, as a condition of his continued employment by the police department, to waive his constitutional privilege against self-incrimination and to answer questions regarding the conduct of his office and the performance of his official duties." *Gardner* v. *Broderick, supra*, at p. 229.

Respondents' new "saving" interpretation of the Charter is inconsistent with a line of decisions of the New York Court of Appeals which have consistently held that Article I, Section 6 of the New York State Constitution, the parallel provision of § 1123, requires an automatic dismissal

[2] This case is now before the Court, October Term, 1967, No. 635.

from office without any hearing being accorded the public official, *Canteline* v. *McLellan*, 282 N.Y. 166 (1940); see *People* v. *Harris*, 294 N.Y. 424 (1945); *People* v. *Doyle*, 286 App. Div. 276 (3rd Dept. 1955), *aff'd* 1 N.Y. 2d 732 (1956).

This position was reaffirmed by the New York Court of Appeals last week in *State of New York* v. *Perla*, No. 376 (decided April 17, 1968), where it upheld the state in an action brought, pursuant to Article I, section 6 of the New York State Constitution, to forfeit defendant's office as Commissioner of Sanitation. There, the defendant Perla had not been given a hearing following his refusal to sign a waiver of immunity before a grand jury. The court recognized that the constitutional provision required automatic termination of employment. The court did not construe the constitutional provision as requiring a hearing since such a construction would have been, as here with respect to the Charter, an unauthorized rewriting of the Constitution. Thus, in both *Perla* and *Gardner*, the New York Court of Appeals has continued to follow its ruling in *Daniman* that invocation of the constitutional privilege automatically terminates employment.[3]

Each of these decisions is equally invalid under the *Slochower* test. It is therefore unnecessary to reach the issue of the employee's duty in the absence of so explicit a mandate. As to this we agree with Dean McKay:

> "It is not easy to find in the purposes of the privilege any justification for limiting the rights of

[3] It should be noted that the 1967 proposed New York State Constitution contained a provision (Article VII, § 3) requiring the attorney-general to conduct a hearing into the fitness of a public officer or employee who refuses to execute a waiver of immunity or to testify before a grand jury. The officer or employee could only be dismissed from his position if it were found, as a result of this hearing, that the refusal to waive immunity or to testify substantially impaired his fitness to serve in office. This establishment of a hearing procedure is a recognition of the absence of such a procedure in Article I, § 6—with obvious implications as to the existence of such a procedure in § 1123.

> public employees by giving the state unlimited powers of inquiry into all matters that might touch upon the official conduct of such employees. Why should not the state bear the burden of establishing proof of misconduct or abuse of office to justify discharge when, as in *Garrity*, it may not use compelled disclosures for the purpose of convicting of crime? Why indeed should lawyers, set aside for special trust and responsibility, be preferred in this matter over public employees as a class, no matter what the official responsibility?"

McKay, *Self-Incrimination and the New Privacy*, 1967, The Supreme Court Review 193, 225-226.

Respondents' contention (Resp. Br. 12) that petitioners were given full hearings dealing with their "refusal to answer questions" ignores the fact that at such hearings petitioners could not be required to explain their reasons for invoking the privilege. As the Court stated in *Hoffman* v. *United States*, 341 U.S. 479, 486-487:

> "if the witness, upon interposing his claim, were required to prove the hazard in the sense in which a claim is usually required to be established in court, he would be compelled to surrender the very protection which the privilege is designed to guarantee. To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result."

The court below did not join in respondents' rewriting of the statute. It noted that "Section 1123 of the City Charter was cited as the legal basis for the dismissals" (R. 86a). It upheld the dismissals after stating the issue to be "whether city employees who refuse to answer questions as to their conduct in office and who plead their privilege against self-incrimination are constitutionally protected against discharge" (R. 87a).

Respondents describe as "neither helpful nor relevant" (Resp. Br. 14) petitioners' characterization of the proceedings in which the constitutional privilege was invoked "as criminal investigations rather than disciplinary proceedings". Respondents do not deny the accuracy of petitioners' characterization; indeed, they admit it by stating that the proceedings before the Commissioner of Investigation "also concerned misconduct amounting to a criminal act" (Resp. Br. 14) *and that proceedings with respect to "competency" would have to be held before the Commissioner of Sanitation. Ibid.*

Respondents' concessions underline petitioners' point that whatever this Court has said with respect to an employee's duty to account to his employer with respect to performance of his duties is inapplicable to this police investigation of alleged criminal acts. As for the grand jury proceedings, their character as a criminal proceeding is not removed because the testimony given under Section 1123 must be "limited to matters concerning their [petitioners] conduct as City employees" (Resp. Br. 14).

In addition, the Fifth Amendment right is fully applicable to punitive administrative proceedings, *In re Ruffalo*, — U.S. —, 36 L.W. 4284, 4286 (April 9, 1968); *Spevack* v. *Klein*, 385 U.S. 511, 515, in which, as in the present case, an individual is subject to the loss of a governmental license or employment as a penalty for the violation of some governmental rule or requirement. *Ex parte Garland*, 4 Wall. 333, 380; *United States* v. *Brown*, 381 U.S. 437, 450. The hearing before the Commissioner of Investigation was the initiatory stage of this quasi-criminal proceeding. Petitioners' are no less entitled to the protections of the Fifth Amendment in these proceedings than was the litigant in *Boyd* v. *United States*, 116 U.S. 616, 631-632, where the privilege against self-incrimination barred the states' power "to convict him of a crime, or to forfeit his property"; discharge from public employment deprives the em-

ployee of a similarly substantial property interest. *Greene* v. *McElroy,* 360 U.S. 474, 506-507; Reich, *The New Property,* 73 Yale L.J. 733, 734 (1964).

While there is no charge here that the petitioners refused to answer questions by their employer, it is significant that even here they would be protected by New York law. See *Schauwecker* v. *Greene,* 96 App. Div. 249 (1st Dept. 1904) and *Martin* v. *O'Keefe,* 195 App. Div. 814 (2d Dept. 1921).

B. Respondents contend that by virtue of *Garrity* v. *New Jersey,* 385 U.S. 493, the petitioners were granted a limited immunity covering their testimony and the fruits of their testimony. But the *Garrity* rule is not an immunity grant, rather it is an exclusionary rule designed to vindicate the defendant's right against coerced self-incrimination. 385 U.S. at 500. *Garrity* may be invoked as a defense to the introduction of improperly obtained or tainted evidence at trial but it does not prevent the institution of a prosecution. As a result there exists a gap between the protections of the *Garrity* exclusionary rule and the Fifth Amendment which may be asserted even as to questions, the answers to which would merely tend to establish grounds for a prosecution.

Furthermore, *Garrity,* as the respondents admit (Resp. Br. 15), does not protect the petitioners against subsequent prosecution based on independent evidence, a protection they would receive if they were formally granted immunity under New York Penal Law § 2447. As such the "*Garrity* immunity" cannot constitutionally supplant the Fifth Amendment right. This Court in *Counselman* v. *Hitchcock,* 142 U.S. 547, 585-586 as quoted in *Albertson* v. *SACB,* 382 U.S. 70, 80 stated:

> "a statute [granting immunity] is valid only if it supplies 'a complete protection from all the perils against which the constitutional prohibition was

> designed to guard . . .' by affording 'absolute immunity against future prosecution for the offense to which the question relates.' "

See also *Stevens* v. *Marks*, 383 U.S. 234, 244-245.

Murphy v. *Waterfront Comm'n*, 378 U.S. 52, is consistent with this rule, since it reaffirms the obligation of the state to grant full immunity from prosecution; any lesser rule merely applied to the federal power to prosecute after immunity was granted.

Acceptance of the respondents' argument,—here made for the first time—would result in the discriminatory exclusion of one class of witnesses—public employees—from statutory immunity in violation of the Equal Protection Clause of the Fourteenth Amendment.

It would discriminate against public employees by giving them not only a reduced privilege against self-incrimination, but a lesser immunity than New York has traditionally given to all other persons, *Matter of Kaffenburgh*, 188 N.Y. 49 (1907); *People ex rel. Taylor* v. *Forbes*, 143 N.Y. 219 (1894); *Matter of Solovei*, 250 App. Div. 117 (2d Dept. 1937), *aff'd* 276 N.Y. 647. As the Appellate Division pointed out in the last case, "the respondent could have been compelled to testify whether he was willing or not" by granting him immunity "because of that concerning which he has testified", 250 App. Div. at 120-121, and "the respondent's willingness to testify, as well also [as] the provisions of section 584 of the Penal Law, is an answer to the charge that, because he refused to waive immunity, he was endeavoring to conceal a wrong" *id.* at 121.

Finally, it is clear that since the petitioners were never informed of the existence of this "*Garrity* immunity" and that it was available for their protection, they were justified in asserting their Fifth Amendment right and refusing to speak. "A witness has, we think, a constitutional right to stand on the privilege against self-incrimination until

it has been fairly demonstrated to him that an immunity, as broad in scope as the privilege it replaces, is available and applicable to him." *Stevens* v. *Marks, supra,* at 246 and n. 11. See also *Raley* v. *Ohio,* 360 U.S. 423.

II.

Petitioners' dismissals from employment resulted from wiretapping in violation of both statute and the constitution.

A. Respondents first argue that the decisions in *Berger* v. *New York,* 388 U.S. 41, and *Katz* v. *United States,* 389 U.S. 347 "should not be applied retroactively to this case" (Resp. Br. 18) under the tests established in *Linkletter* v. *Walker,* 381 U.S. 618 and subsequent cases. Without conceding that constitutional rights should be thus limited (see dissenting opinion of Mr. Justice Black in *Linkletter* v. *Walker, supra* at 640), the instant case is distinguishable on a number of grounds.

First, unlike all of the cases cited by respondents, this case is not a collateral attack upon a final judgment. Petitioners, here, are not, as respondents suggest (Resp. Br. 23), in the same posture as were petitioners in *Johnson* v. *New Jersey,* 384 U.S. 719. Here the decision against petitioners was not final[4] prior to the Court's decisions in *Berger* and *Katz.* Thus to apply the principles enunciated in those cases to petitioners here would not threaten the finality of a conviction as respondents argue (Resp. Br. 23). It should be noted that the rulings in *Mapp* v. *Ohio,* 367 U.S. 643 and *Tehan* v. *Shott,* 382 U.S. 406 were applied to cases not final at the time those decisions were

[4] *Linkletter* v. *Walker, supra* at 622, fn. 5, defines "final" to mean "where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari [has] elapsed."

rendered. See *O'Connor* v. *Ohio*, 382 U.S. 286 and *Fahy* v. *Connecticut*, 375 U.S. 85; *Ker* v. *California*, 374 U.S. 23, respectively.

Secondly, the administration of justice will not be adversely affected in the sense of "opening the jail doors" because this is not an attack upon a criminal conviction. No administrative hardship will follow since this is not a case where new evidence must be found to replace that held to have been illegally introduced.

Finally, respondents cannot point to "the reliance by law enforcement authorities on the old standards", *Stovall* v. *Denno*, 388 U.S. 293, 297. Unlike the cases cited by respondents, the wiretapping here was in plain violation of a federal statute with civil and criminal sanctions. In *Schwartz* v. *Texas*, 344 U.S. 199, the admission of wiretap evidence was permitted because of this Court's desire not to interfere with state criminal proceedings;[5] there was no question that the evidence was obtained in violation of § 605 of the Federal Communications Act, *Benanti* v. *United States*, 355 U.S. 96; *Pugach* v. *Dollinger*, 277 F. 2d 739 (2d Cir. 1960), *aff'd* 365 U.S. 458.

B. Respondents next argue that even if the wiretapping was illegal and unconstitutional, petitioners should not prevail because "these dismissals are connected to the wiretap by a tenuous series of links" (Resp. Br. 26). This is a misapplication of the concept of attenuation as it was used by Mr. Justice Frankfurter in *Nardone* v. *United States*, 308 U.S. 334, 341. The complaint alleges, the affidavits support, and the opinion below does not controvert the fact that the investigation itself "was the result of and accompanied by the interception and divulging of telephone con-

[5] *Harlem Check Cashing Corp.* v. *Bell*, 296 N.Y. 15 (1946) and *People* v. *Stemmer*, 298 N.Y. 728 (1948), *aff'd* by an equally divided court, 336 U.S. 963, cited by respondents (Br. 21) both involved the admissibility of evidence obtained in violation of the federal statute.

versations to which the individual plaintiffs were parties, without the consent of the senders thereof" (R. 7a). The petitioners would not have been faced with the choice of surrendering their constitutional privilege or losing their employment if the Commissioner of Investigation had not violated federal law. It is therefore irrelevant that illegally obtained evidence cannot be used against the petitioners (Resp. Br. 26).

Respondents' statement that "the investigation and the subsequent tap were undertaken as a result of information received from a reliable informant" (Resp. Br. 27) does not legalize the wiretap. Nor does it dispose of the possibility that even that informant was a wiretapper. In *United States* v. *Coplon*, 185 F. 2d 629, 639 (2d Cir. 1950), *cert. denied* 342 U.S. 920, Chief Judge Learned Hand stated that:

> "[T]he testimony so far elicited suggested that the 'confidential informant,' who had touched off the investigation, might well have been a 'wiretapper'; and, if he had been, Judith Coplon was entitled to learn whether she had been a party to any of the intercepted talks."

Respondents have prevented a clarification of the issue by rejecting the petitioners' request for copies of the application for the wiretap order and the papers upon which it was based.[6]

C. Respondents are surely not serious in suggesting that petitioners might reasonably have assumed that their telephone conversations were wiretapped in violation of the federal statute (Resp. Br. 29). Further, there can be no "reasonable" wiretapping pursuant to Section 813-a of the New York Code of Criminal Procedure which this Court declared unconstitutional upon its face in *Berger* v. *New York, supra.* Therefore, there is no occasion for a remand to the district court.

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[6] Petitioners' Reply Brief herein of January 8, 1968, p. 7, n. 4, upon the petition for certiorari.

We conclude by noting respondents' argument that under *Schwartz* v. *Texas, supra,* wiretapping evidence does not invalidate the administrative proceedings below. The refusal of this Court in *Schwartz* v. *Texas, supra,* to reverse a state criminal conviction based upon wiretapping was the result of a belief that Congress, in enacting Section 605 of the Federal Communications Act, did not intend to impose a rule of evidence upon state courts. In *Benanti* v. *United States, supra,* the Court reiterated this view, stating: "[D]ue regard to federal-state relations precluded the conclusion that Congress intended to thwart a state rule of evidence in the absence of a clear indication to that effect." In *Stefanelli* v. *Minard,* 342 U.S. 117, 120, the Court had elaborated further on this theme when, in a federal suit to enjoin the use in a state criminal trial of evidence alleged to have been secured by an unlawful state search, it said:

> "Here the considerations governing that discretion touch perhaps the most sensitive source of friction between States and Nation, namely, the active intrusion of the federal courts in the administration of the criminal law for the prosecution of crimes solely within the power of the States."

The policy considerations precluding federal interference with state criminal prosecutions do not apply to dismissals from city employment based upon violations of a federal statute and of petitioners' rights under the federal Constitution.

CONCLUSION

The judgment below should be reversed.

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